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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DEVION JOHNSON,

Defendant and Appellant.

D068788

(Super. Ct. No. JCF28994)

APPEAL from a judgment of the Superior Court of Imperial County,
Ruth Bermudez Montenegro, Judge. Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Quisteen S.
Shum, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Devion Johnson appeals from a judgment in which he was sentenced to a six-year term for committing a battery on a nonconfined person while he was serving a sentence in confinement. On appeal, Johnson requests that we independently review the records that the trial court reviewed in connection with Johnson's *Pitchess*¹ motion to determine whether the trial court ordered all relevant materials disclosed. We affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *Prosecution evidence*

On March 10, 2011, Johnson was incarcerated at Calipatria State Prison in Imperial County. That afternoon, a correctional officer in the control booth of Johnson's housing unit opened the door to the cell shared by Johnson and inmate Thurston so that they could use the showers. Correctional Officer Gilberto Bermudez told Thurston to go to a designated shower in the housing unit. Thurston initially refused.

Thurston then exited his cell and walked toward the shower. Thurston suddenly turned and moved toward Officer Bermudez. Thurston held his fists, clenched, at "approximately shoulder height in a dukes-up kind of manner" and said, " 'Fuck you,

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

Bermudez.' " Officer Bermudez ordered Thurston to get down on the ground, but Thurston continued moving toward Bermudez. Officer Bermudez believed that Thurston was going to attack him, so Bermudez sprayed Thurston with oleoresin capsicum, also referred to as pepper spray. After being sprayed, Thurston dropped to a prone position.

In the meantime, Johnson, who had exited his prison cell without authorization, began punching Officer Bermudez. Johnson struck Bermudez in the arm several times. Officer Bermudez hit Johnson on the side of his head with the empty can of pepper spray. Another officer then sprayed Johnson with pepper spray, and Johnson dropped to the ground in a prone position. Officer Bermudez subsequently placed Johnson in handcuffs.

Johnson made allegations of excessive force against Bermudez as a result of this incident. Correctional Lieutenant Jack Sigler, who was also working at Calipatria State Prison on March 10, 2011, testified that correctional officers are authorized to use pepper spray to "gain custody for a lawful order and subdue an attacker." When an inmate accuses a correctional officer of excessive force, the correctional institution has someone take statements from the inmate, including a video statement, and interview witnesses. Sigler was the person assigned to investigate Johnson's allegations against Bermudez. Sigler interviewed witnesses, reviewed relevant documentation and prepared a report. At trial, Sigler opined that Bermudez's use of force on March 10, 2011 was "in compliance with departmental use of force policy." The following day, however, the trial court

instructed the jury that it was to disregard Sigler's recommended findings or opinions concerning the results of his investigation.²

2. Defense evidence

Two prisoners who were incarcerated in the same housing unit as Johnson and Thurston testified that there had been no physical altercation between Johnson and Officer Bermudez.

B. Procedural background

On July 20, 2015, a jury found Johnson guilty of battery on a nonconfined person by prisoner, in violation of Penal Code section 4501.5.³ The jury also found true the allegation that Johnson had suffered a prior strike conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

² The trial court instructed the jury as follows:

"Now, you can consider the fact that there was an investigation into the allegation that there was use of excessive force; however; you may not consider for any purpose whatsoever the recommended findings or opinions of Lieutenant Sigler in connection with that investigation.

"Those recommended findings are merely opinions and, therefore, unreliable and inadmissible and irrelevant for the purposes of this trial. It would be highly improper to consider those findings and opinions in reaching a decision in this case.

"You're hereby instructed to disregard that part of the testimony in its entirety. If evidence is presented as to the use of excessive force, you the jurors are the ones that decide if there was excessive force or not."

³ All further statutory references are to the Penal Code unless otherwise indicated.

The trial court denied Johnson's motion to dismiss his prior strike conviction and sentenced Johnson to six years in state prison, to run consecutively to the term Johnson was already serving.

Johnson filed a timely notice of appeal.

III.

DISCUSSION

Prior to trial, Johnson's attorney filed a *Pitchess* motion seeking discovery of personnel information disclosing alleged prior misconduct by several correctional officers.⁴ On appeal, Johnson requests that this court independently examine the sealed transcripts and documents that were produced in response to his *Pitchess* motion to determine whether the trial court abused its discretion in determining that only two complaints were discoverable. The People agree that appellate review of the documents reviewed by the trial court in response to Johnson's *Pitchess* motion is appropriate in the interests of finality and in accordance with *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*).

A. *Additional procedural background*

The trial court held a hearing on Johnson's *Pitchess* motion and, after reviewing the motion and papers filed in response to the motion, determined that the defense had provided plausible justification for the discovery of information related to false reports

⁴ Although the *Pitchess* motion is not in the record, documents related to the motion and the reporter's transcript indicate that the defense sought discovery of the personnel files of Officers Bermudez, DePablo, and Favala.

made by the named correctional officers in the performance of their duties and any complaints of use of excessive force by Officer Bermudez in the performance of his duties.

After conducting an *in camera* review, the trial court ordered the following items to be disclosed to the defense: (1) a complaint made by Captain J. Kellerman against Officer DePablo for allegedly failing to accurately report; and (2) an August 17, 2011, complaint made by an inmate against Officer Bermudez for allegedly using excessive force on August 9, 2011.

It appears that the defense later made a supplemental *Pitchess* motion.⁵ The court determined that a report by another correctional officer was discoverable, given his refusal to speak with the defense investigator. The trial court conducted an additional *in camera* review of CDCR documents, and ordered the disclosure of the discoverable documents, as redacted by counsel for CDCR's custodian of records.

The record was sealed with respect to the *in camera* proceeding, including the clerk's minutes, reporter's transcript, and the documents reviewed by the trial court.

B. *This court's review of the records examined by the trial court reveals no abuse of discretion in the trial court's ruling with respect to Johnson's Pitchess motion*

Johnson requests that this court review the trial court's ruling on his *Pitchess* motion by independently reviewing the materials that the trial court examined *in camera* to determine whether the trial court abused its discretion in denying the motion. The People concede that we have the authority to do so. (See *Mooc*, *supra*, 26 Cal.4th at p.

⁵ This supplemental *Pitchess* motion is also not contained in the record.

1232 [when trial court reviews an officer's file *in camera* and denies disclosure of information, the reviewing court must examine the materials to determine whether the trial court abused its discretion].)

On our own motion, we augmented the record to include the materials that the trial court examined *in camera*. After independently reviewing the documents, we conclude that the trial court did not abuse its discretion in its ruling regarding Johnson's *Pitchess* motion. We therefore affirm the judgment.

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

O'ROURKE, Acting P. J.

IRION, J.